In the Supreme Court of the United States

OCTOBER TERM 1966

No. 912

LOYD CARL RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on October 21, 1966. A petition for rehearing was denied on November 22, 1966. The petition for a writ of certiorari, filed December 27, 1966, is out of time under Rule 22-2 of the Rules of this Court. There is in any event no occasion for review.

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on nine counts charging use of the

mails in execution of a scheme to defraud members of the public by falsely advertising and promoting tours of Hawaii.[1] On November 19, 1966, petitioner was sentenced to four years' imprisonment on each of four counts of the indictment, the sentences to run concurrently, and to three years' imprisonment on each of five counts, the sentences to run concurrently with each other but to be consecutive to the four year terms (Pet. 28-30).

The evidence, which is not here in issue, showed that in October-December, 1963, in St. Louis, one Willard Morton fraudulently promoted two round-trip tours of Hawaii. He set up an office, staffing it with a secretary and two part-time salesmen to solicit persons inquiring about the trips, and mailed various brochures and advertisements to attract a clientele (Tr. IV 95-97). Several people registered for the trips and paid large sums of money to Morton. The prospective travelers never received tickets, their money was never returned, Morton's office was closed, and Morton disappeared. (Tr. IV 114, 117, 123, 127, 137-138, 140, 147-148, 152-153, 156, 159-160, 174, 177, 183, 218, 225-226, 234-236). At trial petitioner was identified as Morton by 13 witnesses, including the secretary and two salesmen, the proprietor of a janitorial firm who cleaned his office and apartment, some customers, and several tellers at banks where he kept accounts (Tr. IV 8, 28, 29, 39, 56-57, 61-63, 67-70, 85-86, 94, 117-118, 133-134, 161-162, 186, 204). In addition, two experts testified that petitioner's hand-

[1] A previous trial resulted in a hung jury.

writing and fingerprints matched those on various documents which "Morton" handled and wrote (Tr. IV 246, 255, 270, 281; V 294-295, 297, 311). Petitioner, on the other hand, produced several witnesses, mostly members of his family, who stated that at all relevant times he was in Denver and never went to St. Louis (Tr. V 350, 390, 410-411, 427-428, 447, 450-451).

1. Petitioner's claim that he was prejudiced by certain comments of the judge at his trial (Pet. 10-13) is discussed in considerable detail in the opinion below (Pet. App. 34-39) and presents no question warranting further review.

a. The judge clearly acted within the area of permissible discretion in clarifying the fact that when a witness talked about "Morton" he meant petitioner (Tr. IV 28). *McCoy* v. *Blakely*, 217 F. 2d 227, 233 (C.A. 8); *Pariser* v. *City of New York*, 146 F. 2d 431, 433 (C.A. 2).

b. Petitioner objects (Pet. 11-12) to a question which the trial court asked of the witness Herpel, an employee of a St. Louis bank in which petitioner had an account. Ledger sheets of the bank showed that checks on petitioner's travel account had been cashed at the bank (Tr. IV 52). On cross-examination, petitioner's counsel inquired about checks that "Morton" cashed at the bank, and the following exchange then occurred (Tr. IV 52-53):

> Q. That indicates that he was in there on those days, wasn't it [*sic*]?
>
> A. Yes.

> The Court: Just a minute. Just a minute. Now, does it indicate that he was in there or that the check was cashed on that day?
>
> The Witness. Well, the check, more likely the check was cashed.

The judge's attempt at clarification tended to aid rather than detract from petitioner's defense which was that he was not in St. Louis at the time.

c. Petitioner further objects (Pet. 10) to comments by the trial court during the cross-examination of the government's fingerprint expert, Wilson. The witness was asked (Pet. App. 35):

> Q. And you and Mr. Schicker [a post office inspector] actually have the same employer, do you not, sir?
>
> A. Sure.
>
> Q. Post Office?
>
> The Court: So does Mr. Gilmore [the prosecutor] and so do I.
>
> Mr. Goodwin: Well, I don't—that is all.

The court of appeals held that the judge's statement was "harmless" (Pet. App. 38), and petitioner suggests no reason why it should be deemed reversible error. The judge's subsequent comment, in response to an objection from counsel, that "[t]he Court has the duty, Mr. Goodwin, to see that justice is done" (Pet. App. 36), seems equally innocuous.

2. Petitioner contends that he was denied "expert * * * services" under the Criminal Justice Act of 1964 (effective August 20, 1965), 18 U.S.C. § 3006A (e). (Pet. 8-10). In particular, petitioner urged below that his counsel was appointed too late under

the Act for him to be able to utilize defense experts effectively. (Pet. 40-41). The argument is without merit. Petitioner's lawyer was first appointed by the court in May 1964, prior to petitioner's first trial. The second trial began on October 25, 1965, and on October 27, 1965, prior to the close of the government's case, Mr. Goodwin was reappointed by the court under the Criminal Justice Act (Tr. IV 289-291). It was not, however, necessary that counsel be appointed under the Criminal Justice Act in order to request that experts be made available to petitioner at government expense. *Bandy* v. *United States*, 296 F. 2d 882 (C.A. 8).

Petitioner also seems to argue that it was improper for the government to produce a fingerprint expert who had not been used at the prior trial. However, counsel had ample time before the case was concluded to ask for the appointment of an expert, and for an adjournment if necessary, after the witness testified. Counsel's failure to do so does not show incompetence as petitioner suggests (Pet. 24-27).[2]

3. Petitioner contends (Pet. 14) that prejudicial newspaper publicity deprived him of a fair trial. However, all of the newspaper articles he includes in the record (Petitioner's Addendum to Record, pp. 1-4) appeared during his first trial, which resulted

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[2] Petitioner also urges (Pet. 25) that counsel erred—and thereby demonstrated his incompetence—in not making a formal application for funds with which to bring 40 additional alibi witnesses to St. Louis. Again, the inference of incompetence seems wholly unwarranted. Moreover, petitioner conceded the competence of his counsel below (Pet. App. 41).

in a hung jury. At luncheon recess on the first day of the second trial, at which petitioner was convicted, the judge told the jury to "remember" his prior "admonition" not to read the newspaper coverage of the trial (Tr. IV 7). Thereafter, the judge issued similar admonitions before each recess (Tr. IV 125, 237, 288-289; V 343, 387, 440). Hence, at his second trial, petitioner's right to be protected against unfavorable publicity, if any, was adequately guarded.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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